



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2867



Charles Whitehead
33 Underwood Road
Hubbardston, MA 01452

RE: Tax Map 3, Lot 29,
Cornish, NH

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
AND HEARING
No. AF 03 - 001**

January 15, 2003

I. INTRODUCTION

This Notice of Proposed Administrative Fine and Hearing is issued by the Department of Environmental Services, Water Division ("the Division") to Charles Whitehead, pursuant to RSA 485-A:17 and Env-C 603.02. The Division is proposing that fines totaling \$21,500 be imposed against Charles Whitehead for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division, is an administrative agency of the State of New Hampshire, having its principal office at 6 Hazen Drive, Concord, NH.
2. Charles Whitehead is an individual having a mailing address of 33 Underwood Road, Hubbardston, MA 01452.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain, erosion control and timber harvesting through a permit program. Pursuant to RSA 485-A:6, VIII, the Commissioner of DES has adopted Env-Ws 415 to implement this program.
2. Pursuant to RSA 485-A:17, III and Env-Ws 415.04, timber harvesting permits are granted by completing the New Hampshire Department of Revenue Administration's *Notice of Intent to Cut Wood or Timber* form ("Intent to Cut").
3. RSA 227-J:7, the forest management statute, states that "[p]ursuant to RSA 485-A:17, any person proposing to dredge, excavate, place fill, mine, transport forest products, or undertake construction in or on the border of surface waters of the state, and any person proposing to significantly alter the characteristics of the terrain, in such a manner as to impede the natural runoff or create unnatural runoff shall comply with the provisions of RSA 485-A. Failure to comply with these requirements may result in penalties under RSA 485-A."

4. Charles Whitehead is the owner of land located in the town of Cornish, more particularly identified on the Town of Cornish Tax Map 3 as Lot 29 (the "Property").
5. On January 2, 2000 Charles Whitehead signed an Intent to Cut for timber harvesting activities on the Property. The Intent to Cut was filed with the Town of Cornish. The Notice identified Andrew Pysz as the logger for the forestry operations to be performed on the Property.
6. Pursuant to Env-Ws 415.04, when Mr. Whitehead executed the Intent to Cut form, he agreed that the forest management activities on the Property would be in accordance with the proper methods of controlling and dispersing water on truck roads, skid trails and log landings set forth in the manual *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire* ("BMP").

The BMP includes the following relevant erosion control provisions:

- a. "Skid Trails: A well thought out efficient transportation system will minimize the area disturbed and vulnerable to erosion. Trail grades should be kept to 15% or less. Steeper grades are permissible for shorter distances. Move surface water quickly off trail surfaces and on to undisturbed forest floor." BMP pp.16-17.
 - b. "Cross Drainage Culverts: When constructing roads on side hill locations, ditch the uphill side of the roadway to intercept surface runoff. When harvesting operation has been completed, the road should be stabilized by installing water bars and removing all pipe culverts from truck roads which will not be maintained." BMP pp. 26-27.
 - c. "Water Bars: To intercept and divert water from side ditches and truck road or skid trail surfaces, minimizing erosion by decreasing the slope length of surface water flow." BMP p. 23.
 - d. "Haul Road, Skid Trail and Log Landing Stabilization: Old or new water diversion structures such as water bars, culverts, broad based dips, etc., must be operative before stabilization is initiated. Where feasible, prepare a seedbed by grading, removing debris, and scarifying the soil to a minimum depth of 3 inches. When the area to be seeded has been recently loosened to the extent that an adequate seedbed exists, no additional treatment is required. Inspect all seeded areas for failures to make necessary repairs. Grasses and other herbaceous cover can stabilize bare mineral soil and minimize erosion. It is a good practice to seed disturbed areas following harvesting. Mulch seedings and anchor on slopes or where subjected to concentrated flow. Track in seed with a dozer whenever possible to improve germination and establishment, especially when seeding flatpea or crownvetch and on sandy, droughty sites." BMP pp.45-46.
8. On March 14, 2000, Douglas Miner, Forest Ranger for the Department of Resources and Economic Development ("DRED"), issued an *Official Notice* (the "Notice") to Andrew Pysz. The Notice alleged that Mr. Pysz had failed "...to comply with Best Management Practices for erosion control." The Notice also required Mr. Pysz to "[i]nstall siltation and erosion control devices on steep grades to control erosion and eliminate water quality problems" and the work was required to be completed by March 17, 2000.

9. On March 15, 2000, DES personnel conducted an inspection of the Property. During the inspection, DES personnel observed that a logging road had been constructed on the Property on a slope that exceeded 15% grade. Inadequate erosion control measures had been employed to control erosion and sediment flow from the logging operation.

10. On April 13, 2000, DES personnel conducted a second inspection of the Property. During the inspection, the following was observed:

- a. Significant sediment was observed flowing down the main skid trail. Sediment was measured to be as much as a foot in depth at the bottom of the skid trail;
- b. No erosion or sediment control measures were in place at the time of the inspection;
- c. A borrow pit was observed on the Property. Deep gullies and rills were observed along the road leading to the borrow pit. Hay bales and a silt fence were observed along the borrow pit road, but measures were inadequate to control erosion and sediment flow;
- d. Gullies and rills were observed as long as 300 feet and 18 inches of average depth along the main skid trail; and
- e. To the south of the landing area, a depression in the skid trail was filled with approximately 18 inches of sediment. Sediment was observed flowing over the top of a silt fence at this location.

11. On October 24, 2000, personnel from DES conducted a third inspection of the Property. During the inspection the following was observed:

- a. Logging operations had been completed;
- b. A logging road extended from Route 12A to approximately half-way up the slope and then branched off into several skidder trails;
- c. The Property generally sloped steeply toward Route 12A. Slopes exceeded the preferred grade of skid trails of 3-5%. Portions of the main skid road exceeded 40% grade;
- d. Sediment from the forestry operations on the Property was observed at the entrance to the Property and in the roadside swales and culverts along Route 12A;
- e. Numerous gullies, up to 4 feet in depth, caused by inadequate erosion control measures by loggers on the Property, were observed on the Property off the main logging road;
- f. A borrow pit, approximately 100 feet by 50 feet, used during forestry operations was observed on the Property. A silt fence was located approximately 20 feet downhill from the edge of the borrow pit. The sides of the pit were unstable and heavily eroded, and sediment was observed sloughing off the sides of the pit toward the silt fence. The silt

fence had not been maintained and sediment overflowed the top of the fence;

g. A culvert had been installed beneath the main logging road approximately half-way between Route 12A and the top of the logging road. The culvert was half full of sediment from material flowing from the side of the hill as a result of logging operations;

h. No water bars were observed on the steep logging road;

i. No check dams were observed in the drainage channels adjacent to the logging road;

j. Erosion and siltation controls had not been adequately deployed resulting in significant erosion and sediment flow throughout the Property;

k. The hydrology of the site has been altered by the construction of the logging road. There were seepage outbreaks on the slopes as a result of the altered terrain; and

l. The logging roads were not constructed according to Best Management Practices. The logging road was not back-dragged, and site was not seeded or mulched and tracked when the logging operation was completed.

12. On October 26, 2000, DES issued Letter of Deficiency WD WQE 00-20 (the "LOD") to Andrew Pysz, and copied Charles Whitehead. As of the date of this document neither Charles Whitehead nor Andrew Pysz have responded to the LOD.

13. On January 31, 2002, DES personnel conducted a follow-up inspection of the Property. At that time, DES personnel observed that the deficiencies noted during previous inspections had not been addressed.

14. On February 20, 2002, DES issued Administrative Order No. WD 02-09 (the "Order") to Charles Whitehead. It was delivered by the Constable of the Town of Hubbardston, Massachusetts on April 28, 2002. The Order, in relevant part, required Whitehead to do the following:

"1. Within 30 days of the date of this Order, submit a restoration and erosion and sediment control plan, prepared by an engineer licensed in the State of New Hampshire, to DES for review. Include in the plan a schedule for implementing the measure called for in the plan. The restoration plan should include at a minimum the following:

a. A plan with dimensions, drawn to scale, showing:

i. existing conditions; and

ii. proposed conditions after reestablishing the area damaged by logging operations;

b. A detailed description of the proposed means of temporary and permanent erosion control (silt fence, hay bales, etc.) and stabilization of the restoration area;

c. A detailed description of the proposed means of restoring the topography of the area

damaged by logging operations;

d. A detailed description of the proposed planting plan for the stabilization and revegetation of the restoration area, including a description of species to be planted, and the distribution of vegetation;

e. A description of the proposed construction sequence, equipment, methods for accomplishing restoration and anticipated restoration compliance date; and

f. A description of the method of documenting at least 75% survival of all vegetation planted during the restoration project. This should include at minimum monitoring progress reports for two successive growing seasons following completion of the restoration project.”

“2. Implement the restoration and erosion and sediment control plan at the Property, as approved by DES, in accordance with the approved schedule.”

15. On August 20, 2002, DES personnel conducted an inspection of the Property to determine compliance with the Order and observed the following:

a. The upper half of the slope facing the main town road was eroding and deep gullies were evident;

b. The cross-road culvert on the logging road had not been removed and drainage was causing erosion of the unstable slope;

c. The bottom half of the slope, although still deeply rutted, had become vegetated;

d. The borrow pit had exposed soils and rutting was evident; and

e. The hydrology of the hillside had been altered by earth-moving activities without the use of Best Management Practices.

IV. VIOLATIONS ALLEGED

1. Charles Whitehead has violated RSA 485-A:17 by failing to comply with the BMP, specifically by:

a. Constructing a haul road or skid trail on grades steeper than 10% or 15%, respectively;

b. Constructing roads on side hill locations, without ditching the uphill side of the roadway to intercept surface runoff;

c. Failing to divert water away from the road surface and onto undisturbed forest floor by the use of ditches.

d. Failing to utilize water bars to intercept and divert water from side ditches and truck road or skid trail surfaces:

- e. Failing to stabilize haul roads and skid trails to reduce damage from sediment and runoff;
 - f. Failing to seed areas of exposed mineral soil that are subject to erosion and where permanent vegetative cover is needed;
 - g. Failing to mulch seedings or anchor on slopes where subjected to concentrated flow;
 - h. Failing to track in seed with a dozer whenever possible to improve germination and establishment;
 - i. Failing to inspect all seeded areas for failures and make necessary repairs;
 - j. Failing to install cross drainage culverts to collect and transmit water flows from side ditches and seeps under truck haul roads and major skid trails;
 - k. Failing to install culverts at appropriate intervals according to grade;
 - l. Failing to stabilize roads when harvesting operation was completed, by installing water bars and removing all pipe culverts from truck roads that will not be maintained.
2. Charles Whitehead has violated RSA 485-A:17 by failing to install erosion control measures during forest management activities on the Property.
3. Charles Whitehead has violated NH RSA 485-A:22 by failing to comply with E. of the Order, described in III.14.1 above, for 8 months.
4. Charles Whitehead has violated NH RSA 485-A:22 by failing to comply with E.2 of the Order, described in III.14.2 above, for 8 months.

V. PROPOSED ADMINISTRATIVE FINES

- 1 For the violation identified in IV.1 above, Env-C 603.02 (e)(1) specifies a fine of \$500.
- 2. For the violation identified in IV.2 above, Env-C 603.02 (i)(1) specifies a fine of \$1000.
- 3. For the violation identified in IV.3 above, Env-C 603.08 (a) specifies a fine of \$2,000 per calendar month that compliance is not achieved after the deadline specified in the Order. For 8 months of non-compliance the fine is \$16,000. At this time, the Division is seeking a fine for 5 months for a fine of \$10,000.
- 4. For the violation identified in IV.4 above, Env-C 603.08 (a) specifies a fine of \$2,000 per calendar month that compliance is not achieved after the deadline specified in the Order. For 8 months of non-compliance the fine is \$16,000. At this time the Division is seeking a fine for 5 months for a fine of \$10,000.

The total fine being sought is \$21,500.

VI. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, you are required to respond to this notice. Please respond no later than February 14, 2002 using the enclosed colored form.

1. If you would like to have a hearing, please sign the appearance section of the colored form and return it to the DES Legal Unit, as noted on the form. A Notice of Scheduled Hearing will be issued.
2. If you choose to waive the hearing and pay the proposed fine, please have the authorized representative sign the waiver (lower portion) and return it with payment of the fine to the DES Legal Unit.
3. If you wish to discuss the possibility of settling the case, please have the authorized representative sign the appearance and return it to the DES Legal Unit and call the DES Legal Unit to indicate your interest in settling.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and, if a hearing is held, submit proposed findings of fact to the person conducting the hearing.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is more likely than not that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

- * Pursuant to Env-C 601.09(c), the fine will be reduced by 10% for each of the circumstances listed below that you prove, by a preponderance of the evidence, applies in this case:
 1. The violation was a one-time or non-continuing violation, **and** you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** you did not benefit financially, whether directly or indirectly, from the violation.
 2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.

3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

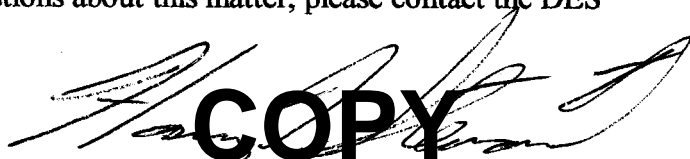
IMPORTANT NOTICE

An administrative fine hearing that is scheduled is a formal hearing. Any hearing will be tape recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show that you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

If you wish to have an informal meeting to discuss the issues, you must contact the DES Legal Unit at (603) 271-6072 to request a prehearing conference.

* * * * *

Information regarding this proposed fine may be made available to the public via DES's Web page (www.state.nh.us/des). If you have any questions about this matter, please contact the DES Legal Unit, at (603) 271-6072.


COPY
Harry F. Stewart, P.E., Director
Water Division

Enclosure (*NHDES Fact Sheet #CO-2 2002*)

Certified Mail/RRR #7000 0600 0023 9936 5947

cc: Mark Harbaugh, DES Legal Unit
Town of Cornish, Board of Selectmen
Town of Cornish, Conservation Commission
Bud Nelson, DRED, Division of Forests and Lands
(all w/out enclosure)

***** RETURN THIS PAGE ONLY *****

CHARLES WHITEHEAD IS REQUIRED BY LAW TO RESPOND TO THIS NOTICE.

PLEASE RESPOND NO LATER THAN FEBRUARY 14, 2002

Please check the appropriate line and fill in the requested information below.

APPEARANCE On behalf of Charles Whitehead,

I request to have a formal hearing scheduled in this matter.

I request to have a pre-hearing conference scheduled in this matter.

I would like to meet informally to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Charles Whitehead,

I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$21,500 paid to "Treasurer, State of New Hampshire" is enclosed.*

Pursuant to Env-C 203.05 please provide the following information:

Signature

Date

Name (please print or type):

Title: _____

Phone: _____

RETURN THIS PAGE ONLY TO:

**Department of Environmental Services
Legal Unit
6 Hazen Drive, P.O. Box 95
Concord, NH 03302-0095**

If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order